Supreme Court, U.S.
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No. 93-1090

In The

Supreme Court of the United States

October Term, 1993

BRYANT MILLSAPS, et al.,

Appellants,

v.

PHILLIP R. LANGSDON, et al.,

Appellees.

On Appeal From The United States District Court For The Western District Of Tennessee

APPELLEES' MOTION TO DISMISS OR AFFIRM

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23 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED 2

OPINION BELOW 2

ARGUMENT 5

A. *The District Court properly applied well-settled precedent of this Court in finding that population deviations of 13.9% in Tennessee's legislative reapportionment plan cannot reasonably further the rational state policy of preserving county lines, in the face of an apportionment plan deviating less than 10% while splitting even fewer county lines* 6

B. *The District Court properly applied well-settled precedent of the Tennessee Supreme Court, which precedent followed the directives of this Court, in finding that Tennessee cannot constitutionally justify a population deviation of 13.9% in its reapportionment plan by the rational state policy of preserving county lines, when fewer county lines may be split with a population deviation of less than 10%* 9

C. *The questions presented by the unpublished opinion below are so insubstantial that they do not merit further argument* 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Growe v. Emison, 113 S.Ct. 1075 (1993) 12

Karcher v. Daggett, 455 U.S. 1303, 102 S.Ct. 1298, 71 L.Ed. 2d 635 (1982) 13

Lincoln County v. Crowell, 701 S.W.2d 602 (Tenn. 1985) 11

Mahan v. Howell, 410 U.S. 315 (1973) 7, 10

Reynolds v. Sims, 377 U.S. 533 (1964) 6

State ex rel Lockert v. Crowell, 631 S.W.2d 702 (Tenn. 1982) 11

State ex rel Lockert v. Crowell, 656 S.W.2d 836 (Tenn. 1983) 9, 10, 11

Voinovich v. Quilter, 113 S.Ct. 1149 (1993) 9

White v. Regester, 412 U.S. 1055 (1973) 6

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Pursuant to Rule 18.6, Appellees move to dismiss this appeal or to affirm the District Court's ruling below on the ground that the unanimous decision of the three-judge District Court below was soundly based on a correct application of this Court's well-settled law, so as to warrant no further review by this Court. The questions raised by Appellants as to the unpublished opinion below are so insubstantial that they do not merit further argument.

QUESTIONS PRESENTED

A simple reading of the Opinion below reveals that Appellants' statement of the Questions Presented misstates that Opinion. Accurately stated, the questions presented are:

1. Did the District Court properly apply well-settled precedent of this Court in finding that population deviations of 13.9% in Tennessee's legislative reapportionment plan cannot reasonably further the rational state policy of preserving county lines, in the face of an apportionment plan deviating less than 10% while splitting even fewer county lines?

2. Did the District Court properly apply well-settled precedent of the Tennessee Supreme Court, which precedent followed the directives of this Court, in finding that Tennessee cannot constitutionally justify a population deviation of 13.9% in its reapportionment plan, by the rational state policy of preserving county lines, when fewer county lines may be split with a population deviation of less than 10%?

OPINION BELOW

In the closing days of the 1992 session of the Tennessee General Assembly, Chapter 836 of the Acts of 1992 was adopted, which redistricted the Tennessee House of Representatives. This bill was signed into law on April 29, 1992, less than thirty days prior to the May 21, 1992 qualifying deadline for candidates for the 1992 election. Appellees promptly challenged the constitutionality of

Chapter 836 and a three-judge panel was convened pursuant to 28 U.S.C. §2284. Appellees sought a preliminary injunction restraining Appellants from closing the qualifying period for candidates for the 1992 elections in order that relief could be obtained in time for the 1992 general elections. Appellees' request for preliminary injunction was denied and the 1992 elections were held pursuant to Chapter 836.

Thereafter, Appellees filed a Motion for Summary Judgment. This Motion was thoroughly briefed by all parties and subsequently argued. The facts were not in dispute. Chapter 836 created House districts with a total population deviation of 13.9%, while splitting thirty county lines in forming multi-county districts. Appellants' only proffered justification for the deviation was to further the rational state policy of preserving county lines. Appellees presented an alternative plan which split only twenty-six counties, but had a total population deviation of only 9.84%.

By unanimous decision of the three-judge Court announced in open court on June 21, 1993, summary judgment was granted in favor of Appellees and the State was enjoined from conducting further elections in accordance with Chapter 836. A written, but unpublished, Opinion and Order was issued by the Court below on September 15, 1993. The Court found Chapter 836 to violate the "one person, one vote" requirement of the Fourteenth Amendment, making it unnecessary to decide Appellees' additional arguments of unconstitutional partisan gerrymandering and violation of the Voting Rights Act.

The Order directed Appellants to present a new redistricting plan by December 24, 1993 or face the prospect of conducting 1994 elections under a court-ordered plan. Appellants moved to alter or amend the judgment below, seeking *inter alia* an extension of the deadline for enactment of a new redistricting plan, noting that the General Assembly was scheduled to begin its regular session on January 11, 1994. The Court below unanimously denied the substantive portions of Appellants' Motion to Alter or Amend, but granted Appellants additional time to develop a new plan of redistricting. The deadline was extended, pursuant to Appellants' request, to January 25, 1994, allowing the legislature to consider the matter in regular session.

Appellants then sought to stay imposition of the very deadline which they had previously sought, and filed a Motion for Stay. Appellants' Motion was denied by unanimous decision of the three-judge District Court. Thereafter, Appellants' Application for Stay filed in this Court was denied by Justice Stevens.

In accordance with the Order of the Court below, the Tennessee legislature, in regular session, did in fact adopt a new plan of redistricting. Chapter 536, Acts of 1994, was adopted by the House and Senate on January 19, 1994 and signed by the Governor on January 20, 1994. The act contains three alternative plans of apportionment for the House. Section 1 contains the primary plan. Section 2 provides as follows:

> If the plan of apportionment in Section 1 is declared to be invalid by a court of competent jurisdiction in a final determination of any action under the Voting Rights Act or under the

> Thirteenth, Fourteenth or Fifteenth Amendments to the United States Constitution on the grounds of dilution of minority voting strength, then the plan of apportionment for the House of Representatives shall be the plan of apportionment contained in Section 1 with the exception of the following districts which shall be composed as follows: . . .

Section 3 provides:

> If the plan of apportionment for the House of Representatives contained in Chapter 836 of the Public Acts of 1992, codified as Tennessee Code Annotated, Section 3-1-103, is determined to be constitutional and valid by a court of competent jurisdiction in a final determination of any action contesting its validity, then the plans of apportionment for the House of Representatives in Sections 1 and 2 of this act shall be null and void and such Chapter 836 of the Public Acts of 1992, codified as Tennessee Code Annotated, Section 3-1-103, shall remain the plan of apportionment for the House of Representatives.

See Appendix.

Chapter 536 of the Public Acts of 1994 has now been filed with the District Court for its review.

ARGUMENT

A. The District Court properly applied well-settled precedent of this Court in finding that population deviations of 13.9% in Tennessee's legislative reapportionment plan cannot reasonably further the rational state policy of preserving county lines, in the face of an apportionment plan deviating less than 10% while splitting even fewer county lines.

The first "Question Presented" contained in Appellants' Jurisdictional Statement is an incorrect statement of the ruling of the District Court below. The District Court did not declare, or even intimate, that the 13.9% deviation in the State's reapportionment plan constituted a *per se* violation of the equal protection clause. Likewise, the District Court, contrary to Appellants' assertion, did not preclude consideration of justification for the deviation. The District Court considered everything the State put before it.

This Court has clearly provided the applicable standard of analysis for these types of cases. That standard of analysis is described in Appellants' Jurisdictional Statement (page 10) and is not at issue in this case. Beginning with *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court has held that the equal protection clause mandates that states reapportion their legislatures according to population. However, some divergences are constitutionally permissible provided that they are based on "legitimate considerations incident to the effectuation of a rational state policy." Population deviations of 10% or less are presumed valid. *White v. Regester*, 412 U.S. 1055 (1973). However, where a population deviation exceeds 10%, an

inquiry is required as to whether the plan reasonably furthers a rational state policy and, if so, whether the divergences are also within tolerable limits. *Mahan v. Howell*, 410 U.S. 315 (1973).

In applying that standard of analysis to the facts of this case, Appellants admit that Chapter 836 contained a population variance of 13.9% and split thirty of the ninety-five counties in Tennessee. Appellants concede that where the population variance exceeds 10%, as here, they have the burden of proof to show that the variance "reasonably furthers a rational state policy." The parties below agreed that preserving county lines is a rational state policy. Appellants contended below that the 13.9% variance reasonably furthered that rational state policy. Appellees, however, filed with the Court an Alternative Plan which contained a population variance of 9.84%, and yet split only twenty-six counties. This Alternative Plan conclusively proved that the 13.9% variance of Chapter 836 was not necessary to the furtherance of state policy, and in fact, operated in derogation of that policy.[1]

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[1] This finding is further supported by the plans which have surfaced since the Court's opinion. The Rural West Tennessee Plaintiffs filed with the District Court on December 13, 1993 a plan which has a variance of 9.99% and splits 28 counties. Section 1 of Chapter 536 contains a plan which has a variance of 9.96% and splits 29 counties. Section 2 of Chapter 536 contains a plan which also has a variance of 9.96% and splits 30 counties. An amendment to Chapter 536 was offered in committee which has a variance of 9.76% and splits 21 counties. Another amendment was offered on the floor of the House which has a variance of 9.87% and splits 21 counties. Thus, the point made by the Plaintiffs' alternative plan – that it was not necessary to exceed 10% variance in order to preserve county lines – has now been

The Court below properly undertook the analysis dictated by this Court. Rather than precluding consideration of any justification for the population deviation in Chapter 836, the Court below considered, and rejected, the justification advanced by Appellants. The only rationale advanced by Appellants below for the excessive variance of Chapter 836 was preservation of county lines. In fact, Appellants argued below it was *they* who were entitled to summary judgment; that the facts were not in dispute and their rationale was before the Court. Brief in Response to Motion for Summary Judgment, pages 4, 7, filed as Exhibit "A" to Appellees' Response to Application for Stay.

Appellants' claim that they were precluded from offering additional proof has already been rejected. See Order of the Three-Judge Court, Appellants' Appendix 5a, 6a. At the Summary Judgment stage, Appellants offered no other rationale for their deviation. Thus, Appellants' claim that they were precluded from doing so misstates the record.

Since the Court below considered, and rejected, Appellants' rationale for the excessive deviation, Appellants cannot support their argument that the Court reduced the analysis of this case to a wholly mathematical exercise, or found a *per se* violation as Appellants suggest. As the Court below succinctly stated, "It is patently unreasonable to justify a 14% variance on the basis of not splitting county lines when fewer counties may be

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reinforced by five additional plans which achieve the same result.

split while simultaneously *decreasing* that variance below the 10% goal." Opinion and Order of the Three-Judge Court, Appellants' Appendix, page 17a.

Voinovich v. Quilter, 113 S.Ct. 1149 (1993), cited in Appellants' Jurisdictional Statement, is inapplicable. In *Voinovich,* the District Court held that total deviations in excess of 10% cannot ever be justified by a policy of preserving the boundaries of political subdivisions, and therefore, had made a *per se,* wholly mathematical analysis. In contrast, the District Court in this case specifically considered whether, under the facts of this case, the preservation of county lines justified the variances in Chapter 836, and found that it did not. Thus, the Court below made the analysis required by *Voinovich* and found the State's proof wanting.

B. The District Court properly applied well-settled precedent of the Tennessee Supreme Court, which precedent followed the directives of this Court, in finding that Tennessee cannot constitutionally justify a population deviation of 13.9% in its reapportionment plan by the rational state policy of preserving county lines, when fewer county lines may be split with a population deviation of less than 10%.

Appellants' second "Question Presented" erroneously accuses the District Court of "intruding" upon the state reapportionment process by redefining the Tennessee Supreme Court's stated policy in reapportionment cases. Appellants assert that the Tennessee Supreme Court in *State ex rel Lockert v. Crowell,* 656 S.W.2d 836 (Tenn. 1983) [*Lockert II*] established a state policy that any

plan falling below a 14% deviation limit and a thirty county division limit is permissible. Appellants claim that since Chapter 836 falls within these limits, it is constitutionally acceptable.

Appellants misconstrue both *Lockert II* and the Opinion below. To read *Lockert II* as Appellants do, not only reduces the analysis to a wholly mathematical exercise (something to which Appellants themselves strenuously object) but also fails to comply with this Court's directives. As the District Court observed, "This argument misses the point of the three-part test." Opinion of Three-Judge Court, Appellants' Appendix, page 13a. Appellants advanced the same reading of *Lockert II* below, prompting the District Court to comment that the argument "fails under a careful reading of the *Lockert II* opinion itself." Opinion of Three-Judge Court, Appellants' Appendix, page 13a. The District Court correctly recognized that nowhere in the *Lockert II* opinion does the Tennessee Supreme Court purport to establish an absolute numerical standard. Opinion of Three-Judge Court, Appellants' Appendix, page 14a.

To accept Appellants' argument of the meaning of *Lockert II*, would be to completely ignore the mandate of this Court as set forth in *Mahan v. Howell, supra.* However, the Tennessee Supreme Court in *Lockert II* embraced that mandate. In *Lockert II*, the Tennessee Supreme Court stated:

> This Court is not persuaded . . . that we should sanction a single county line violation not shown to be necessary to avoid a breach of federal constitutional requirements. We adhere

> to the law of this case established in our Opinion released on March 31, 1982. *Lockert II, supra,* at 839.

The Opinion of March 31, 1982, *State ex rel Lockert v. Crowell,* 631 S.W.2d 702 (Tenn. 1982) [*Lockert I*] had stated:

> The provisions of the Tennessee Constitution, although of secondary import to equal protection requirements, are nonetheless valid and must be enforced insofar as possible. If the state is correct in its insistence that there is no way to comply with the mandates of the federal and state constitutions without crossing county lines, then we hold that the plan adopted must cross as few lines as is necessary to comply with the federal constitutional requirements.

Id., at 714, 715.

The Tennessee Supreme Court could hardly be more clear that its policy is to require a plan to cross as few county lines as necessary, while complying with federal constitutional requirements. The decision of the Court below was entirely in keeping with *Lockert II* and *Lincoln County v. Crowell,* 701 S.W.2d 602 (Tenn. 1985). What Appellants fail to recognize is that in each of those cases, the State was able to support its asserted justification for the deviation. In this case, the State's justification cannot be supported by the rationale it advanced.

The fact that the District Court did not "redefine" state policy as expressed in *Lockert II,* is not the only proof that it did not "breach the important doctrine of federalism by interfering with the state reapportionment process." Appellants' claim that the three-judge panel "has removed much of the task of reapportioning from

the hands of the elected representatives of the State of Tennessee and made it a mathematical exercise" (Jurisdictional Statement, page 18) is baseless. The District Court noted in its Opinion the importance of the state legislative process in reapportionment and has made every effort to avoid imposition of a judicial plan. The District Court even delayed the deadline contained in its Opinion in order to permit the state legislature to act in regular session rather than call a special session.

This fact alone distinguishes this case from *Growe v. Emison*, 113 S.Ct. 1075 (1993), upon which Appellants rely in their Jurisdictional Statement. In *Growe*, the District Court had adopted its own plan in the face of state court action, and had enjoined the state court from issuing its own redistricting plan. In this case, on the other hand, the District Court actively encouraged the state's development of its own redistricting plan. In fact, Judge Merritt, speaking for the three-judge District Court, announced the Court's decision orally from the bench on June 21, 1993, including the fact that the Court would permit the legislature another chance to draw an acceptable plan. The legislature thus has had seven months in which to act. The fact that the legislature has acted further proves that the District Court properly deferred to the state legislative process. It is important to note that *Growe* recognized that deferral, *not* abstention, is required, and that the imposition of a deadline for legislative action is entirely appropriate. *Id.* at 1082. The fixing of a deadline for legislative action at a time requested by the Appellants and which they have now met can hardly be "undue interference."

C. The questions presented by the unpublished opinion below are so insubstantial that they do not merit further argument.

This case presents no basis for reconsidering this Court's well-settled standards in apportionment cases. No novel issues and no substantial federal questions are raised by this unpublished opinion. Unlike *Karcher v. Daggett*, 455 U.S. 1303, 102 S.Ct. 1298, 71 L.Ed.2d 635 (1982), this case does not require this Court to further clarify any of its reapportionment standards in light of a District Court divided on an issue of interpretation. The District Court's unanimous decision was well-reasoned and properly applied the facts before it to existing law.

Appellants make much of the fact that at least twenty other states have some type of provision in their state constitution pertaining to maintaining the integrity of political subdivisions in reapportioning their legislative bodies. There is no dispute whatsoever that preserving the boundaries of political subdivisions is a rational state policy. The State here had only to prove that its excessive population deviations *furthered* that policy. This it failed to do. There are no questions raised here which would have any impact on other states in their reapportionment process.

Appellants complain that "one of the major difficulties in legislative reapportionment is the lack of clear standards to guide a state legislature in fulfilling its constitutional obligations." Jurisdictional Statement, page 16. To the contrary, the standards are quite clear. As the District Court noted in its unanimous opinion, "The Supreme Court has spoken concerning applicable federal

Constitutional standards." Appellants' Appendix, page 9a. If a reapportionment plan has a population deviation which exceeds 10%, the state must justify the deviation with a rational state policy. This the State of Tennessee failed to do in this case.

By their questions presented, Appellants cite two reasons why this Court should note probable jurisdiction in this case. However, because the questions presented in Appellants' Jurisdictional Statement misstate the record below and the opinion of the District Court, Appellants' assertions have no basis either in the law or in the record. Accordingly, there is no basis for noting jurisdiction.

CONCLUSION

The three-judge District Court was correct in its unanimous, unpublished opinion finding that Appellants failed to prove that the population deviations of Chapter 836 reasonably furthered the rational state policy Appellants advanced. The Court below did not preclude Appellants' opportunity to justify the population deviation of Chapter 836. Rather, Appellants offered a justification which they were logically incapable of proving. The Court below merely applied existing state and federal law in finding that the variances in Chapter 836 bore no relationship to the purported justification of adherence to a rational state policy of preserving county boundaries.

This case warrants no further review by this Court. The questions presented are insubstantial and the

decision below was correct. The appeal should be dismissed and the judgment below affirmed.

Respectfully submitted,

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Date: February 2, 1994

APPENDIX

STATE OF TENNESSEE

PUBLIC CHAPTER NO. 536

SENATE BILL NO. 592

By Rochelle

Substituted for House Bill No. 776

By Ridgeway, Purcell, DeBerry

AN ACT Relative to state representative districts and to amend Tennessee Code Annotated, Section 3-1-103.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 3-1-103, is amended by deleting the section in its entirety and by substituting instead the following:

> Section 3-1-103: (a) (1) All census descriptions, counties, tracts, blocks, census delineations, census district lines and other census designations are those established for or by the United States Department of Commerce, Bureau of the Census, for taking the 1990 federal decennial census in Tennessee as contained in the automated geographic data base, known as the TIGER (Topologically Integrated Geographic Encoding and Referencing) System. All voting districts (VTDs) are precincts aggregated from such census blocks as reported to the Office of Management Information Services for the General Assembly by the Office of Local Government, Comptroller of the Treasury pursuant to the provisions of Tennessee Code Annotated, Title 2, Chapter 3, Part 1.

(2) All subdivisions listed under a county are voting districts (VTDs) unless labeled as tracts and blocks.

(b) It is the intention of the general assembly that:

(1) Each district be represented by a single member;

(2) Districts must be substantially equal in population in accordance with constitutional requirements for "one person one vote";

(3) Geographic areas, boundaries and population counts used for redistricting shall be based on the 1990 federal decennial census;

(4) Districts must be contiguous and contiguity by water is sufficient;

(5) No more than thirty (30) counties may be split to attach to other counties or parts of counties to form multi-county districts; and

(6) The redistricting plan will comply with the Voting Rights Act and the fourteenth and fifteenth amendments to the United States Constitution.

(c) Until the next enumeration of qualified voters and apportionment of representatives, the State House of Representatives shall be composed as follows:

[Subsection (c) contains the block/tract census data assignments for all 99 house districts which has been omitted due to that fact that such data

is of a technical nature and would be of no assistance to this Court.]

(d) Nothing in this section shall be construed as depriving any member of the House of Representatives of the Ninety-eight General Assembly of such member's office, or as affecting or modifying the constitutional requirements of the provisions of Article II, Section 3 of the Constitution of Tennessee. At the November, 1994 general election, and thereafter until changed by law, representatives shall be elected to represent the districts as constituted and provided by this section. If the seat of a member of the House of Representatives becomes vacant prior to the general election in which a representative is to be elected to represent the district as constituted and provided by this section, in accordance with Article II, Section 15 of the Constitution of Tennessee, a successor shall be elected by the county legislative body to represent the district.

(e) It is the legislative intent that all House of Representatives districts shall be contiguous and, toward that end, if any voting district or other geographical entity designated as a portion of a district is found to be noncontiguous with the larger portion of such district, it shall be constituted a portion of the district smallest in population to which it is contiguous. Similarly, if any area is found not to be included in a representative district, that non-included area should be included in the district smallest in population to which it is contiguous.

(f) Any reapportionment of county legislative bodies shall not affect these legislative districts.

SECTION 2. If the plan of apportionment in Section 1 is declared to be invalid by a court of competent jurisdiction in a final determination of any action under the Voting Rights Act or under the Thirteenth, Fourteenth or Fifteenth Amendments to the United States Constitution on the grounds of dilution of minority voting strength, then the plan of apportionment for the House of Representatives shall be the plan of apportionment contained in Section 1 with the exception of the following districts which shall be composed as follows:

[The balance of Section 2 contains the block/tract census data assignments for all 99 house districts which has been omitted due to that fact that such data is of a technical nature and would be of no assistance to this Court.]

SECTION 3. If the plan of apportionment for the House of Representatives contained in Chapter 836 of the Public Acts of 1992, codified as Tennessee Code Annotated, Section 3-1-103, is determined to be constitutional and valid by a court of competent jurisdiction in a final determination of any action contesting its validity, then the plans of apportionment for the House of Representatives in Sections 1 and 2 of this act shall be null and void and such Chapter 836 of the Public Acts of 1992, codified as Tennessee Code Annotated, Section 3-1-103, shall remain the plan of apportionment for the House of Representatives.

SECTION 4. This act shall take effect upon becoming a law, the public welfare requiring it.

SENATE BILL NO. 592

PASSED: January 19, 1994

/s/ John S. Wilder
JOHN S. WILDER,
SPEAKER OF THE SENATE

/s/ Jimmy Naifeh
JIMMY NAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 20th day of January 1994

/s/ Ned McWherter
NED McWHERTER, GOVERNOR